



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 18, 1992

Honorable James M. Kuboviak
Brazos County Attorney
County Courthouse
Bryan, Texas 77803

Letter Opinion No. 92-35

Re: Whether a justice of the peace may
be an unpaid deputy sheriff or deputy
constable (RQ-240)

Dear Mr. Kuboviak:

You have requested our opinion as to whether a justice of the peace may simultaneously hold the position of deputy constable in three particular situations: (1) in the precinct in which he serves as justice of the peace; (2) in another precinct in his county; and (3) in a precinct outside his county.

Article XVI, section 40 of the Texas Constitution prohibits one individual from holding more than one civil office of emolument. Although the position of justice of the peace is an office of emolument, it is specifically excepted from the prohibition of article XVI, section 40. Thus, there is no *constitutional* bar to a single individual holding the office of justice of the peace and another office.

The doctrine of common-law incompatibility, however, prohibits one person from holding two offices if the duties of the two positions are inconsistent or in conflict or if one office is subordinate to another. *Thomas v. Abernathy County Line Indep. School Dist.*, 290 S.W. 152 (Tex. Comm'n App. 1927, judgm't adopted); Attorney General Opinions DM-55 (1991); JM-1047. A justice of the peace, who is an elected official, clearly occupies an office; so, too, does a deputy constable. *Rich v. Graybar Electric Co.*, 84 S.W.2d 708, 709 (Tex. 1935).

In Attorney General Opinion JM-1047, this office considered whether a justice of the peace might also serve as a jailer in the same county. The opinion noted that

[a] justice of the peace is an elected officer who takes the constitutional oath of office and expressly owes his allegiance to the constitution and laws of the United States and Texas.

A jailer is an employee of the sheriff. The opinion described the incompatibility as follows:

There are many opportunities for the sheriff to appear as a petitioner before the justice of the peace. In an instance when the justice of the peace is also the sheriff's jailer, the individual who holds both positions would be subject to conflicting loyalties. As justice, he owes allegiance directly to the constitution and laws, as set out in his oath of office. As jailer, he is subject to the sheriff's orders.

The same reasoning used in Attorney General Opinion JM-1047 applies to a situation in which the two positions are that of justice of the peace and deputy constable. Subsection 86.021(e) of the Local Government Code provides that "the constable shall attend each justice court held in the precinct." Under the rationale of Attorney General Opinion JM-1047, an unequivocal case of incompatibility arises when the justice of the peace and the deputy constable share a common precinct. As indicated therein, one's allegiance as justice is "to the constitution and laws," while, as deputy constable, he is subject to the constable's orders.

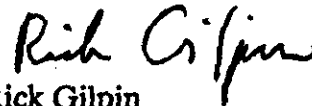
Although subsection 86.021(a) of the Local Government Code provides that a constable may serve civil or criminal process "anywhere in the county in which the constable's precinct is located," such writs are returnable only to the justice court in which the constable serves. As a result, we perceive no incompatibility where a justice of the peace holds a position as deputy constable in a precinct which is located outside the precinct in which he serves as justice of the peace. Likewise, although subsection 86.021(d) of the Local Government Code authorizes a deputy constable to serve civil process in any "county contiguous to the constable's county, the writs are returnable exclusively to the originating justice court." Accordingly, there is no incompatibility between the office of justice of the peace in one county and the office of deputy constable in another county.

You also ask whether a justice of the peace may hold the position of deputy sheriff in a county other than the county he serves as justice. For the reasons discussed above, this situation poses no problem of incompatibility, since a sheriff, or his deputy, would have no occasion to appear before a justice of the peace in a county other than his home county.

S U M M A R Y

The common-law doctrine of incompatibility prohibits an individual from simultaneously holding the positions of justice of the peace and deputy constable in the same precinct. However, there is no bar to a justice of the peace serving as deputy constable in a different precinct, whether within or without his home county. Likewise, a justice of the peace may hold the position of deputy sheriff in a county other than the county he serves as justice of the peace.

Yours very truly,

A handwritten signature in black ink that reads "Rick Gilpin". The signature is written in a cursive, slightly slanted style.

Rick Gilpin
Deputy Chief
Opinion Committee